February 2005

MJI Publications Updates

Adoption Proceedings Benchbook

Child Protective Proceedings Benchbook (Revised Edition)

Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Domestic Violence Benchbook (3rd ed)

Friend of the Court Domestic Violence Resource Book (Revised Edition)

Sexual Assault Benchbook

Traffic Benchbook—Revised Edition, Volume 1

February 2005

Update: Adoption Proceedings Benchbook

CHAPTER 2

Freeing a Child for Adoption

2.13 Termination Pursuant to a Step-Parent Adoption

C. Grandparent Visitation

In *DeRose v DeRose*, 469 Mich 320, 333–334 (2003), the Michigan Supreme Court held that MCL 722.27b (grandparent visitation) was unconstitutional because the statute failed to require that the trial court give deference to a fit parent's decision regarding grandparent visitation. Effective January 3, 2005, 2004 PA 542 amended MCL 722.27b and incorporated the *DeRose* Court's holding by requiring a trial court to give deference to a fit parent's determination. It is now presumed that a fit parent's decision to deny grandparent visitation does not create a substantial risk of harm to the child's mental, physical, or emotional health. A grandparent must overcome that presumption and prove by a preponderance of the evidence* that the parent's decision to deny grandparent visitation creates a "substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). On page 64, delete the quote of MCL 722.27b(1) and add the following text:

*If an appellate court determines in a "final and nonappealable judgment" that this standard of proof is unconstitutional, then grandparents seeking visitation must provide clear and convincing proof that the parent's decision to deny grandparent visitation creates a substantial risk of harm to the child's mental, physical, or emotional health. MCL 722.27b(4)(c).

MCL 722.27b(1) states:

> "A child's grandparent may seek a grandparenting time order under 1 or more of the following circumstances:
>
> > "(a) An action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court.
> >
> > "(b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.
> >
> > "(c) The child's parent who is a child of the grandparents is deceased.

> "(d) The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013, by an order of filiation entered under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, or by a determination by a court of competent jurisdiction that the individual is the father of the child.
>
> "(e) Except as otherwise provided in subsection (13) [governing placement of a child for adoption, quoted below], legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.
>
> "(f) In the year preceding the commencement of an action under subsection (3) for grandparenting time, the grandparent provided an established custodial environment for the child as described in [MCL 722.27], whether or not the grandparent had custody under a court order."

MCL 722.27b(13) states:

> "Except as otherwise provided in this subsection, adoption of a child or placement of a child for adoption under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, does not terminate the right of a grandparent to commence an action for grandparenting time with that child."

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.7 Grandparent Visitation

In *DeRose v DeRose*, 469 Mich 320, 333–334 (2003), the Michigan Supreme Court held that MCL 722.27b (grandparent visitation) was unconstitutional because the statute failed to require that the trial court give deference to a fit parent's decision regarding grandparent visitation. Effective January 3, 2005, 2004 PA 542 amended MCL 722.27b and incorporated the *DeRose* Court's holding by requiring a trial court to give deference to a fit parent's determination. It is now presumed that a fit parent's decision to deny grandparent visitation does not create a substantial risk of harm to the child's mental, physical, or emotional health. A grandparent must overcome that presumption and prove by a preponderance of the evidence* that the parent's decision to deny grandparent visitation creates a "substantial risk of harm to the child's mental, physical, or emotional health." MCL 722.27b(4)(b). On page 206, delete the quote of MCL 722.27b(1) and add the following text:

*If an appellate court determines in a "final and nonappealable judgment" that this standard of proof is unconstitutional, then grandparents seeking visitation must provide clear and convincing proof that the parent's decision to deny grandparent visitation creates a substantial risk of harm to the child's mental, physical, or emotional health. MCL 722.27b(4)(c).

MCL 722.27b(1) states:

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>
> > "(a) An action for divorce, separate maintenance, or annulment involving the child's parents is pending before the court.
> >
> > "(b) The child's parents are divorced, separated under a judgment of separate maintenance, or have had their marriage annulled.
> >
> > "(c) The child's parent who is a child of the grandparents is deceased.
> >
> > "(d) The child's parents have never been married, they are not residing in the same household, and paternity has been established by the completion of an acknowledgment of parentage under the acknowledgment of parentage act, 1996 PA305, MCL 722.1001 to 722.1013, by an order of filiation entered under the paternity act, 1956 PA 205, MCL 722.711 to 722.730, or by a determination by a court of competent jurisdiction that the individual is the father of the child.

> "(e) Except as otherwise provided in subsection (13) [governing placement of a child for adoption, quoted below], legal custody of the child has been given to a person other than the child's parent, or the child is placed outside of and does not reside in the home of a parent.
>
> "(f) In the year preceding the commencement of an action under subsection (3) for grandparenting time, the grandparent provided an established custodial environment for the child as described in [MCL 722.27], whether or not the grandparent had custody under a court order."

MCL 722.27b(13) states:

> "Except as otherwise provided in this subsection, adoption of a child or placement of a child for adoption under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, terminates the right of a grandparent to commence an action for grandparenting time with that child. Adoption of a child by a stepparent under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, does not terminate the right of a grandparent to commence an action for grandparenting time with that child."

February 2005

Update: Child Protective Proceedings Benchbook (Revised Edition)

CHAPTER 2

Reporting & Investigating Suspected Child Abuse & Neglect

2.18 Access to FIA's Registry

Effective January 3, 2005, 2004 PA 563 amended MCL 722.627(2) by adding a provision that allows the confidential FIA record to be made available to the Foster Care Review Board. At the bottom of page 50, after subsection (r) insert the following quote:

> "(s) A foster care review board for the purpose of meeting the requirements of 1984 PA 422, MCL 722.131 to 722.139a."

"Specified information."

Effective January 3, 2005, 2004 PA 563 amended MCL 722.622(y). On page 51, replace the quote of MCL 722.622(y) with the following quote:

> "'Specified information' means information in a children's protective services case record related specifically to the department's actions in responding to a complaint of child abuse or neglect. Specified information does not include any of the following:
>
> > (*i*) Except as provided in this subparagraph regarding a perpetrator of child abuse or neglect, personal identification information for any individual identified in a child protective services record. The exclusion of personal identification information as specified information prescribed by this subparagraph does not include personal identification information identifying an individual alleged to have perpetrated child abuse or neglect, which allegation has been classified as a central registry case.

(*ii*) Information in a law enforcement report as provided in section 7(8).

(*iii*) Any other information that is specifically designated as confidential under other law.

(*iv*) Any information not related to the department's actions in responding to a report of child abuse or neglect."

CHAPTER 4

Jurisdiction, Venue, & Transfer

4.6 Anticipatory Neglect or Abuse Is Sufficient for Court to Take Jurisdiction of a Newborn Child

On page 95 before the first full paragraph, insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the Court of Appeals held that where respondent's parental rights to previous children were involuntarily terminated based upon abandonment and her parental rights to other previous children were voluntarily terminated after child protective proceedings were initiated, it was not error for the court to find jurisdiction based upon the doctrine of anticipatory neglect. The Court rejected the mother's argument that "[p]ast conduct is not a statutory ground for asserting jurisdiction, there must be some current physical harm or threat of serious emotional harm." *Id.* at ___ quoting *Dittrick, supra* and *Powers, infra*.

CHAPTER 17

Permanency Planning Hearings

17.5 Court's Options Following Permanency Planning Hearings

On page 368 before the first full paragraph, insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the Court explored the distinction between "physical compliance" with the Case Service Plan and improvement in parenting ability. The Court stated:

> "'Compliance' could be interpreted as merely going through the motions physically; showing up for and sitting through counseling sessions, for example. However, it is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody. In other words, it is necessary, but not sufficient, to physically comply with the terms of a parent/agency agreement or case service plan. For example, attending parenting classes but learning nothing from them and, therefore, not changing one's harmful parenting behaviors is of no benefit to the parent or child.
>
> "It could be argued that a parent complied with a case service plan which merely required attending parenting classes but was silent as to the need for the parent to benefit from them. It is our opinion that such an interpretation would violate common sense and the spirit of the juvenile code, which is to protect children and rehabilitate parents whenever possible so that the parents will be able to provide home for their children which is free of neglect or abuse."

CHAPTER 18

Hearings on Termination of Parental Rights

18.7 Standard and Burden of Proof Required to Establish Statutory Basis for Termination

On page 379 immediately before Section 18.8, insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the trial court took jurisdiction over the children and found statutory grounds for termination of the respondent-mother's parental rights to them. The trial court entered two orders. The first order took jurisdiction of the children and required the respondent-mother to comply with the case service plan. The second order terminated the respondent-mother's parental rights to the children; however the court suspended the effect of the termination order contingent on respondent-mother's compliance with all conditions of the case service plan. The agreement to suspend the effect of the termination order to provide the respondent with an opportunity to comply with the case service plan is known as an *Adrianson** agreement. *Adrianson* agreements provide that if a respondent complies with the conditions set by the agreement, usually compliance with the case service plan, then the court would set aside the order terminating the respondent's parental rights. If the respondent fails to comply, then the termination order goes into effect. In *Gazella*, the Court of Appeals held that use of an *Adrianson* agreement violates MCL 712A.19b(5) and MCR 3.977(E), (F)(1), and (G)(3). The Court held:

**In re Adrianson,* 105 Mich App 300, 319 (1981).

> "The statute and court rule are clear: once the court finds there are statutory grounds for termination of parental rights, the court must order termination of parental rights and must further order that 'additional efforts for reunification of the child with the parent not be made,' unless the court finds that termination of parental rights to the child is clearly not in the child's best interest. . . . Once the statutory grounds for termination have been proven (unless the court finds that termination of parental rights to the child is clearly not in the child's best interest), the court must terminate parental rights immediately. An *Adrianson* order cannot be entered." *Gazella, supra* at ___.

CHAPTER 18

Hearings on Termination of Parental Rights

18.8 Requirements for the "Best Interest" Step

On page 380 before the first paragraph, insert the following text:

*See the update to Section 18.7, above, for explanation of *Adrianson* agreements.

In *In re Gazella*, ___ Mich App ___, ___ (2005), the trial court found statutory grounds for termination of the respondent-mother's parental rights and entered an order terminating her parental rights. However, pursuant to an *Adrianson* agreement,* the court suspended the effect of the termination order. The Court of Appeals held that the use of *Adrianson* agreements violates MCL 712A.19b(5) and MCR 3.977(E)(3), (F)(1), and (G)(3). *Gazella, supra* at ___.

In *Gazella*, at the time it found the statutory grounds for termination existed, the trial court stated:

> "Now obviously I have not made findings on best interest because by stipulation any order terminating her parental rights will be suspended to determine whether she is able to and does comply with conditions that may be set."

The respondent-mother failed to comply with the conditions set, and the trial court entered the order terminating her parental rights without making best interest findings. Although the respondent-mother appealed the termination of her parental rights, she did not raise the issue that the trial court failed to make best interest findings. The Court of Appeals indicated that an argument could be made that the termination order was entered erroneously because the lower court made no best interest findings. The Court of Appeals rejected this argument and stated the following in dicta:

> "Neither the statute nor court rule require the court to make specific findings on the question of best interest, although trial courts usually do. In fact, most trial courts go beyond the question of whether termination is clearly not in a child's best interest and affirmatively find that termination is in a child's best interest. Such a finding is not required, but is permissible if the evidence justifies it. The statute and court rule provide that once a statutory ground for termination has been established by the requisite standard of proof, the court must enter an order of termination unless the court finds that termination is clearly not in the child's best interest. If the court makes no finding regarding best interest, then the court has not found that termination would clearly not be in the child's best interest. While it would be best for trial courts to make a finding that there was insufficient evidence that termination was clearly not in a child's best interest, it is not required where no

party offers such evidence, as here. In order for a valid termination order to enter, when no evidence is offered that termination is clearly not in the child's best interest, all that is required is that at least one statutory ground for termination be proved."

CHAPTER 18

Hearings on Termination of Parental Rights

18.9 Termination of Parental Rights at Initial Dispositional Hearing

On page 383 immediately before Section 18.10, insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the Court of Appeals found that MCR 3.977(E)(3) clearly provides that once the court finds a statutory ground for termination of parental rights, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest, the court must terminate parental rights *immediately*. The Court held that trial courts may not enter *Adrianson** orders, whereby the termination order is suspended in order to provide the respondent with additional time to comply with a case service plan or other conditions.

**In re Adrianson*, 105 Mich App 300 (1981). See the update to Section 18.7, above, for more information on *Adrianson* orders.

CHAPTER 18

Hearings on Termination of Parental Rights

18.10 Termination of Parental Rights on the Basis of New or Different Circumstances

On page 384 before the paragraph beginning "**Time requirement for hearing** . . . ," insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the Court of Appeals found that MCR 3.977(F)(1) clearly provides that once the court finds a statutory ground for termination of parental rights, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest, the court must terminate parental rights *immediately*. The Court held that trial courts may not enter *Adrianson** orders, whereby the termination order is suspended in order to provide the respondent with additional time to comply with a case service plan or other conditions.

**In re Adrianson*, 105 Mich App 300 (1981). See the update to Section 18.7, above, for more information on *Adrianson* orders.

CHAPTER 18

Hearings on Termination of Parental Rights

18.11 Termination of Parental Rights in Other Cases

On page 387 immediately before the paragraph beginning "**Time requirement for hearing** . . . , " insert the following text:

In *In re Gazella*, ___ Mich App ___, ___ (2005), the Court of Appeals found that MCR 3.977(G)(3) clearly provides that once the court finds a statutory ground for termination of parental rights, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest, the court must terminate parental rights *immediately*. The Court held that trial courts may not enter *Adrianson** orders, whereby the termination order is suspended in order to provide the respondent with additional time to comply with a case service plan or other conditions.

**In re Adrianson*, 105 Mich App 300 (1981). See the update to Section 18.7, above, for more information on *Adrianson* orders.

February 2005

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.24 Motion to Dismiss Because of Double Jeopardy—Multiple Punishments for the Same Offense

Insert the following text after the January 2004 update to page 57:

A defendant's murder conviction based on alternate theories of felony-murder and first-degree premeditated murder does not offend the prohibition against double jeopardy, but in such a case, the defendant may not also be convicted of and sentenced for the predicate felony on which the felony-murder charge was based. *People v Williams II*, ___ Mich App ___, ___ (2005).

In *Williams II*, the Court noted that it was bound by the special panel's decision in *People v Bigelow*, 229 Mich App 218 (1998), which required that a predicate felony conviction be vacated when a defendant is convicted of felony-murder. *Williams II*, *supra* at ___. However, the *Williams II* Court suggested that in cases where it could be determined with certainty that the jury convicted the defendant based on evidence of premeditation, the defendant's murder conviction would not rest on his or her conviction of a predicate felony. *Williams II, supra* at ___. In those cases, the Court suggested that the defendant could be sentenced for the predicate felony because that conviction is not required to support any other sentence imposed on the defendant. *Williams II, supra* at ___.

Part 2—Individual Motions

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following text before the third paragraph on page 64:

In *United States v Martin*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit Court of Appeals relied on *California v Hodari D*, 499 US 621 (1991), in determining that a firearm abandoned by the defendant as he fled from police officers was properly admitted into evidence against him.

In *Martin*, two police officers saw the defendant trespassing and stopped their patrol car to arrest him. *Martin, supra* at ___. The defendant ran from the officers and as he fled, the defendant discarded a revolver. *Martin, supra* at ___. The defendant argued the revolver was inadmissible because the officers' seizure of him was unlawful. *Martin, supra* at ___.

The *Martin* Court disagreed and relied on *Hodari D* in its ruling:

> "[W]hen a suspect refuses to submit to a show of authority by the police, the suspect is not seized by the police until such time as he or she submits or is forced to submit to police authority. . . . [B]ecause a seizure does not occur when a mere show of authority occurs, but only when one yields to a show of authority, the fourth amendment does not apply to anything one may abandon while fleeing the police in an attempt to avoid a seizure." *Martin, supra* at ___, citing *Hodari D, supra* at 626, 629.

Part 2—Individual Motions

6.37 Motion to Suppress Evidence Seized Without a Search Warrant

1. Searches of Automobiles for Evidence

Insert the following case summary after the February 2004 update to page 90:

In *Illinois v Caballes*, 543 US ___ (2005), a police officer lawfully stopped the defendant for a traffic violation. Another officer—one accompanied by a narcotic-sniffing dog—heard the police dispatch about the traffic stop and joined the defendant and the first officer at the scene. As the first officer completed his duties with regard to the traffic stop, the second officer walked the drug-sniffing dog around the exterior of the defendant's vehicle, and the dog alerted to the trunk of the defendant's car. *Caballes, supra* at ___. A search of the defendant's trunk revealed a quantity of marijuana for which the defendant was charged and convicted. The defendant claimed that the marijuana was inadmissible against him because he was detained beyond the time necessary to process the initial traffic stop, and because no reasonable suspicion existed to support the search of his vehicle. *Caballes, supra* at ___.

Citing to *United States v Jacobsen*, 466 US 109 (1984), the *Caballes* Court explained that when police conduct does not affect a defendant's legitimate interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not demand fourth amendment analysis. *Caballes, supra* at ___. The Court reiterated its reasoning in *Jacobsen*: a defendant can have no legitimate interest in possessing contraband. Thus, where police conduct reveals *only* the defendant's possession of contraband, no legitimate interest in privacy was implicated. *Caballes, supra* at ___, citing *Jacobsen, supra* at 123.

In the *Caballes* Court's opinion:

> "[C]onducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy." *Caballes, supra* at ___.

Relying on the decision reached in *United States v Place*, 462 US 696 (1983), the *Caballes* Court further concluded:

> "[T]he dog sniff was performed on the exterior of a respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." *Caballes, supra* at ___.

February 2005

Update: Domestic Violence Benchbook (3rd ed)

CHAPTER 3

Common "Domestic Violence Crimes"

3.8 Misdemeanor Stalking

B. Legitimate Purpose Defense to Stalking

On page 83 after the last paragraph, insert the following text:

In *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005), the Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq*. MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a

licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

February 2005

Update: Friend of the Court Domestic Violence Resource Book (Revised Edition)

CHAPTER 8

Criminal Court Proceedings Involving Domestic Violence

Part I — Elements of Common Domestic Violence Crimes

8.4 Stalking

C. Defenses to Stalking

1. Legitimate Purpose Defense

On page 224 after the case summary of *People v Coones,* insert the following case summary:

- *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005):

The Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq*. MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.

> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

February 2005

Update: Sexual Assault Benchbook

CHAPTER 3

Other Related Offenses

3.30 Stalking and Aggravated Stalking

D. Defenses to Stalking

1. Legitimate Purpose

On page 196 after the case summary of *People v Coones,* insert the following case summary:

- *Nastal v Henderson & Associates Investigations, Inc*, ___ Mich ___, ___ (2005):

The Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq*. MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:

> "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.

> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at ___.

February 2005

Update: Traffic Benchbook—Revised Edition, Volume 1

CHAPTER 6

Marine Vessels and Personal Watercraft (PWC)

Part B—Traffic Offenses in the Marine Safety Act

6.13 Right of Way Requirements and Operation of Vessels in Restricted Areas or at Restricted Times

Change the title of Section 6.13 as indicated and add the following new sub-subsection to the bottom of page 6-18:

C. Operation of Vessels at Restricted Times

Effective January 3, 2005, 2004 PA 547 created a new traffic offense involving the operation of "airboats" during certain hours when the vessels are within a specific distance of area residences.

According to MCL 324.80101, an "airboat" is "a motorboat that is propelled, wholly or in part, by a propeller projecting above the water surface." MCL 324.80101(a). MCL 324.80108a(1) prohibits a person from operating an airboat on state waters "within 450 feet of a residence between the hours of 11 p.m. and 6 a.m. at a speed in excess of the minimum speed required to maintain forward movement." There are three exceptions to this rule:

- operating an airboat during an emergency when necessary to protect public safety.
- operating an airboat after it has run aground in an effort to free the boat.
- operating a clearly marked and identifiable airboat for a governmental purpose. MCL 324.80108a(2)(a)–(c).